

1 HONORABLE THOMAS S. ZILLY  
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UNITED STAETS DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

10 BRENTA TAYLOR, individual, and as executor of  
11 the Estate of Che Andre Taylor; JOYCE TAYLOR,  
12 individually; CHE ANDRE TAYLOR, JR.,  
13 individually; and SARAH SETTLES on behalf of  
her minor child, CMT,

Plaintiffs,

14 v.  
15 CITY OF SEATTLE; MICHAEL SPAULDING  
16 AND "JANE DOE" SPAULDING, and their martial  
community composed thereof; SCOTT MILLER  
17 and "JANE DOE" MILLER; and their martial  
community composed thereof; TIMOTHY  
18 BARNES and "JANE DOE" BARNES, and their  
martial community composed thereof; and AUDI  
19 ACUESTA and "JANE DOE" ACUESTA, and their  
community composed thereof,

Defendants.

No. 2:18-cv-00262-TSZ

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' PARTIAL MOTION TO  
DISMISS UNDER 12(B)(6)**

**ORAL ARGUMENT REQUESTED**

21  
22 COMES NOW BRENTA TAYLOR, individual, and as executor of the Estate of Che Andre  
23 Taylor; JOYCE TAYLOR, individually; CHE ANDRE TAYLOR, JR., individually; and SARAH  
24 SETTLES on behalf of her minor child, CMT, ("Plaintiffs"), by and through their attorneys and  
25 responds to the Defendants Partial Motion to Dismiss as follows:  
26

27 Plaintiff's Response to Defendant's Partial  
Motion to Dismiss Under 12(b)(6)  
28

**LEGAL ANALYSIS AND AUTHORITY**

In seeking dismissal for failure to state a viable claim, a defendant thus bears the “very high burden” of showing that the plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *See Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir.1986). The rule 12(b)(6) motion addresses itself solely to the question of whether the complaint fails to state a claim and is not designed to correct inartistic pleadings or to force compliance with requirements of Rule 10 as to the force of the pleadings. *Walker Process Equipment Inc., v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965). For the purpose of a motion to dismiss (1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader. *Swierkiewicz v. Sorema, N.A.* 122 S. Ct. 992 (2002). On a motion to dismiss, a court must look to the essence of each claim and not merely the form in which it is pleaded. *Calcutti v. SBU, Incorporated*, 224 F. Supp. 2d 641 (SDNY 2002).

The Supreme Court has stated:

In appraising the sufficiency of the complaint, we follow of course, the accepted rule that a complaint should not be dismissed for failure to state a claim **unless** it appears beyond doubt that the plaintiff can prove **no** set of facts in support of his claim which would entitle him to relief.

*Conley v. Gibson*, 355 U.S. 41, 46, 78 S.Ct. 99 (1957).

A claim has plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2000)(quoting *Twobly*, 500 U.S. at 556); *see Flaherty v. Lang*, 199 F.3d 607 (2<sup>nd</sup> Cir. 1999.) (Reluctance to dismiss applies with greater force when plaintiff alleges civil rights violations). Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals

1 observed, be context-specific task that requires the reviewing court to draw on its judicial experience  
 2 and common sense. *Ashcroft v. Iqbal*, 556 U.S. 662 (2000).

3 *Twombly* does not require a court of the motion-to dismiss stage to consider whether the factual  
 4 allegations are probably true, the Supreme Court made it clear that a court must take the allegations as  
 5 true, no matter how skeptical the court may be. *Twombly*, 550 U.S. at 555.

6 Similarly, it need not appear that the plaintiff can obtain the particular relief prayed for in the  
 7 complaint as long as the district judge can ascertain from what has been alleged that some relief may  
 8 be granted by the court. *U.S. V. Howell*, 318 F.2d 162 (9<sup>th</sup> Cir. 1963).

9 If the complaint is ambiguous or does not contain sufficient information to allow a responsive  
 10 pleading to be framed; the proper remedy is a motion for a more definite statement under rule 12(e). *Id*  
 11 *see also Fed. R. Civ. Pro 12(e)*. Similarly, an attempt to eliminate or strike improper or redundant  
 12 matters from the complaint should be made under rule 12(f). *See Fed. R. Civ. Pro. 12(f)*.

14

15 ***Plaintiffs State A Claim For Negligence Upon Which Relief Can Be Granted As The Conduct Could***  
***Be Intentional for Some Police and Negligence For Other Conduct***

16

17 Defendants cite numerous cases for their position, and the Plaintiffs want to point out that it  
 18 believes that each and every case cited by the Defendants all dealt with the cases at summary judgment  
 19 stage, after discovery and depositions were taken, not a motion to dismiss stage.

20

21 Plaintiffs Amended Complaint is premised on intentional acts of Officers Spaulding and Miller,  
 22 which could be deemed negligent and the negligence of Officers Barnes and Acuesta. Plaintiffs  
 23 alleged that Officers Spaulding and Miller committed intentional torts and Officer Barnes and Acuesta  
 24 acts and omissions were negligent. In the Amended Complaint, the Plaintiffs clearly allege that  
 25 officers yelled inconsistent commands at Che Andre Taylor while firearms were pointed at him. Che  
 26 Andre Taylor's attempt to comply with these inconsistent commands contributed to his death.

1 Officer's Barnes and Acuesta were two of the officers that were yelling conflicting commands at Che  
 2 Andre Taylor.

3 Notably, Officer Spaulding and Miller were yelling commands that were inconsistent as well at  
 4 Mr. Taylor as they were approaching him with guns drawn.

5 Under the set of facts set forth in the complaint, Plaintiffs believe they allege facts that, taken  
 6 as true, support their claim for negligence. In order to state a cause of action for negligence, it is  
 7 necessary to allege facts which would warrant a finding that the defendant has committed an  
 8 unintentional breach of a legal duty, and that such breach was a proximate cause of the harm. *See*  
 9 *O'Donohue v. Riggs*, 73 Wash. 2d 814, 440 P.2d 823 (1968)(Plaintiff can establish use of force claim  
 10 upon showing that someone unintentionally but carelessly used excessive force).

12 In Washington, the public duty doctrine defines the four instances under which a governmental  
 13 entity may be found to owe a statutory or common law duty to a particular member of the public,  
 14 namely (i) legislative intent, (ii) failure to enforce, (iii) the rescue doctrine, or (iv) a special  
 15 relationship. *See Cummins v. Lewis County*, 156 Wash.2d 844, 853 & n. 7, 133 P.3d 458 (2006). If one  
 16 of these four "exceptions" does not apply, then no liability may be imposed for a public officer's  
 17 negligent conduct, based on the reasoning that a duty was not owed specifically to the individual  
 18 plaintiff, as opposed to the public in general. *Id.* at 852, 133 P.3d 458. Given that Defendants have yet  
 19 to Answer the Amended Complaint, and Plaintiffs have yet to take any discovery, it is premature to  
 20 state that the four instances do not apply to the case at hand.

22 Plaintiffs' negligence claims are premised on intentional and negligent actions of all the  
 23 officers and the complaint sets forth facts upon which the Plaintiffs can obtain relief upon this claim.  
 24

**1      Plaintiffs Allege §1983 Claims Against The City Of Seattle and Make a Proper Monell Claim**

**2**      In *AE ex rel. Hernandez*, 666 F.3d. 631, (9<sup>th</sup> Cir. 2012), the plaintiff alleged a *Monell* claim  
**3** against the County of Tulare in its complaint, in which the district held the complaint did not meet  
**4** Rule 8. The Ninth Circuit Court of Appeals struggled and addressed the conflicts between cases and  
**5** addressing Rule 8. *Id.* The Court of Appeals held that the district court abused its discretion when it  
**6** dismissed the Plaintiffs section 1983 claim without leave to amend. *Id.*

**7**      Defendants are correct that Plaintiffs are alleging respondent superior based on the officers'  
**8** actions, in addition, to Monell claims. The City of Seattle may be liable for intentional torts under a  
**9** theory of *respondent superior* if the employee was acting in the scope and course of employment. *See*  
**10** *Kyreacos v. Smith*, 89 Wn.2d 425 (1977).

**12**      Moreover, it can be reasonably inferred that the City of Seattle's custom of giving conflicting  
**13** commands, decedent attempting to comply with the conflicting commands by putting his hands up in  
**14** the air and then attempting to drop them to the ground, officers shooting decedent thereafter within  
**15** seconds after approaching decedent meets the threshold for a Monell claim as the policy or custom of  
**16** giving conflicting commands and shooting and killing an individual within seconds is deficient, it  
**17** caused great harm to the plaintiffs, and it could be viewed that the policy/custom amounted to  
**18** deliberate indifference. This Court should deny the City's Motion to dismiss any claims against the  
**19** City for § 1983 liability.

**22      Plaintiff State A Claim For Violation of the Washington Law Against Discrimination Where  
 23      Plaintiff Does Meet the Essential Elements Of The Statute**

**24**      Plaintiffs' Sixth Cause of Action lies under the Washington Law Against Discrimination, RCW  
**25** 49.60.030 *et seq.* ("WLAD") (Dkt 6, ¶ 5.6). WLAD declares that each person has a right to be free  
**26**

**27** Plaintiff's Response to Defendant's Partial  
**28** Motion to Dismiss Under 12(b)(6)

1 from discrimination based on, among other things, race, creed, color, national origin, and mental  
 2 disability. Wash. Rev. Code § 49.60.030 (West 2018).

3 RCW 49.60.010 provides:

4  
 5 "This chapter shall be known as the 'law against discrimination'. It is an exercise of  
 6 the police power of the state for the protection of the public welfare, health, and  
 7 peace of the people of this state, and in fulfillment of the provisions of the Constitution  
 8 of this state concerning civil rights. The legislature hereby finds and declares that  
 9 practices of discrimination against any of its inhabitants because of race, creed,  
 10 color, national origin, sex, marital status, age, or the presence of any sensory,  
 11 mental, or physical handicap are a matter of state concern, that such discrimination  
 12 threatens not only the rights and proper privileges of its inhabitants but  
 13 menaces the institutions and foundation of a free democratic state...."

14 RCW 49.60.010.

15  
 16 The Court of Appeals liberally construes Washington's law against discrimination to achieve  
 17 its purpose of eliminating and preventing discrimination. *See Griffith v. Boise Cascade Inc.*, 111  
 18 Wash. App. 436, 45 P.3d. 589 (2002).

19 In *McKinney v. City of Tukwila*, 103 Wash. App. 391 (2000), white police officers and city  
 20 [defendants] were not liable on claim asserted under state Law Against Discrimination by African-  
 21 Americans whose vehicle was detained in park following a report that vehicle's occupants might be  
 22 connected to armed burglary that had just occurred; ***there was no evidence*** that the officer who  
 23 requested that the car to be stopped knew its occupants were African-American, and mere fact that  
 24 white people in park were not detained did not show detention was motivated by race. (Emphasis  
 25 added)

26 An action for discrimination under RCW 49.60.215 requires a showing that the unequal  
 27 treatment was motivated by race. *See McKinney v. City of Tukwila, citing Evergreen Sch. Dist. No. 114*  
 28 *v. Human Rights Comm'n*, 39 Wn. App. 763, 773, 695 P.2d 999 (1985).

Plaintiff's Response to Defendant's Partial  
 Motion to Dismiss Under 12(b)(6)

In this case, there is evidence that officers knew that Che Andre Taylor was African American as they had him under surveillance. The Officer defendants in this case claim to have been surveilling Che Andre Taylor and two Caucasian individuals for a significant period of time. There is no indication that the officers witnessed any violent interactions between Che Andre Taylor and anyone else on the date in question. Che Andre Taylor was the only individual who was shot and killed, and the other individuals involved who were white, were not shot or killed. Plaintiffs believe that race was a motivating factor in the actions the police took against Che Andre Taylor.

The Plaintiffs maintain that race played a role relation to how the Seattle Police Department and its defendant officers interacted with Che Andre Taylor and ultimately killed him. This claim should be allowed to proceed. Plaintiffs' further note that they have made a federal 1983 claim involving inequitable treatment based on race that should also be allowed to proceed to trial.

#### ***Plaintiffs State a Claim Against Officers Audi Acuesta and Timothy Barnes***

Officers Acuesta and Barnes are identified as Defendants in this case. There are sufficient allegations against all officers, including Officers Acuesta and Barnes, to give rise to a plausible claim for relief. There are factual allegations against Acuesta and Barnes, that formed the basis of this case, in which they drove a vehicle which captured some audio and video portions of this incident. (Dkt. 6, para. 4.10). In the audio recording, multiple police officers can be heard simultaneously giving Che Andre Taylor conflicting commands. (Dkt. 6 at para. 4.12). Some officers can be heard yelling at Che Andre Taylor to put his hands up while other police officers can be heard yelling at him to get on the ground. (Dkt. 6 at para. 4.13). The police commands to Che Andre Taylor were being yelled at Che Andre Taylor from multiple directions. (Dkt. 6 at para. 4.14). After shooting Che Andre Taylor, police officers rolled his body over and handcuffed him. (Dkt. 6 at para. 4.18). Critical minutes lapsed

1 between the time in which Che Andre Taylor was shot and the time that police officers allowed  
 2 medical emergency personnel to render aid. (Dkt. 6 at para. 4.20). Che Andre Taylor was ultimately  
 3 shot and killed while attempting to comply with conflicting police officer commands. (Dkt. 6 at 4.24).  
 4 These factual allegations give rise to a cause of action against Officer Acuesta and Barnes. Several of  
 5 the Plaintiffs' causes of action can extend to alleged actions of Officers Acuesta and Barnes.  
 6 Therefore, the Court should deny the Defendants request to dismiss Officers Acuesta and Barnes.  
 7  
 8

**9 *Plaintiffs Allege a False Arrest Where Mr. Taylor Was Arrested And Where Plaintiffs Also Bring***  
***10 An Unlawful Seizure Claim***

11 Plaintiffs are pleading all three claims, state law claims of false arrest, unlawful seizure, federal  
 12 claims under § 1983. The three claims may appear duplicative, but each claim is distinct, separate and  
 13 a different claim. It appears that Defendants concede that Taylor was seized, but are silent on whether  
 14 he was arrested when officers rolled his body over and handcuffed him. The Court should allow  
 15 Plaintiff's Third and Fourth Causes of Action as pleaded.

**16 *Officers violated Joyce Dorsey Fourteenth Amendment Rights by depriving her of her familial***  
***17 relationship with Che Andre Taylor***

18 The parents and child of a victim of an unlawful police killing have a claim for deprivation of  
 19 familial relationship under the due process clause of the Fourteenth Amendment. *Wilkinson v. Torres*,  
 20 610 F.3d 546, 554 (9th Cir. 2010) (parents). Official conduct that "shocks the conscience" in  
 21 depriving family members of that relationship is a due process violation. *Wilkinson*, 610 F.3d at 554.  
 22 Where the circumstances of the conduct are such that "actual deliberation [was] practical, then an  
 23 officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* "On the other hand, where  
 24 a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may  
 25

only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.” *Id.*

Where § 1983 does not provide suitable remedies for constitutional violations, the federal courts are instructed to turn to state law “so far as the same is not inconsistent with the Constitution and laws of the United States.” 42 U.S.C. § 1988(a).

In *Robertson v. Wegmann*, 436 U.S. 584, 594 98 S. Ct. 1991, 56 L.Ed.2d 554 (1978), the Supreme Court held that state law on survivorship of causes of action should control so long as that state law is not generally “inhospitable to survival of § 1983 actions...[and] has no adverse effect on the policies underlying § 1983.” The Supreme Court, however, has still not resolved the issue of whether wrongful death cause of action may be pursued under § 1983. Nevertheless “[c]onfronted with standing problems, federal courts have ‘borrowed’ the wrongful death remedy as well as the survival remedy from state statutes under the vehicle of 42 U.S.C. § 1988, declining to apply state limitations on recovery if necessary to fairly compensate victims of constitutional deprivations and to deter police misconduct.” *Davis v. City of Ellensburg*, 651 F.Supp. 1248, 1253 (E.D. Wash. 1987), (Court holding that the wrongful death action brought on behalf of the decedent’s parents was not barred, and any limitations imposed by the statute are inconsistent with the purposes of § 1983. The goals of deterrence, compensation and federal supremacy require that defendants’ motion to dismiss, and for summary judgment, on the basis of lack of standing under the state wrongful statute must be denied); citing *Brazier v. Cherry*, 293 F.2d 401 (5<sup>th</sup> Cir. 1961), and *Bell v. City of Milwaukee*, 746 F.2d 1205, 1238 (7<sup>th</sup> Cir. 1984).

Therefore, this Court should allow Joyce Dorsey to proceed with her Fourteenth Amendment claims and borrow Washington State Law Survival and Wrongful Death Statutes.

1           ***Plaintiffs May Bring § 1983 Claims Under The Fourth and Fourteenth Amendment***

2           For the reasons set forth above, some Plaintiffs are allowed to bring a § 1983 claims on behalf  
 3 of Joyce Dorsey. Additionally, the Estate also has standing to bring its own claim under § 1983. The  
 4 Plaintiffs believe all claims by the Plaintiffs should survive.

5

6           ***Plaintiffs Cause of Action for the Torts of Outrage and Assault***

7           Defendant Officer's Spaulding and Miller shot Che Andre Taylor several times within seconds  
 8 of getting out of their unmarked police vehicle. The defendant officers' poorly planned approach of  
 9 Che Andre Taylor coupled with their inconsistent commands created conditions for Che Andre  
 10 Taylor's wrongful death. A claim under § 1983 for excessive force fits and meets all the requirements  
 11 set forth in the torts of outrage and assault. Plaintiffs are willing to stipulate that these claims are tied  
 12 to the excessive use of force claim.

13

14

15           ***Only Claims of Use Of Force Should Be Analyzed Solely Through The Lens Of The Fourth  
 16 Amendment And Other Claims Should Be Analyzed Through Substantive Due Process Claims***

17           Plaintiffs agree that excessive force claims should be analyzed under the Fourth Amendment.  
 18 However, Plaintiffs are also bringing more additional claims and not solely an excessive force claim.  
 19 All of the Plaintiffs claims, with the exceptions of the use force claim, should be viewed through  
 20 substantive due process claims.

21

22

23           ***Brenda Taylor's Substantive Due Process Claims Under § 1983 Should Be Dismissed***

24           Plaintiffs agree that Brenda Taylor's claim for a substantive due process claim under § 1983  
 25 should be dismissed.

26

27           Plaintiff's Response to Defendant's Partial  
 Motion to Dismiss Under 12(b)(6)

## CONCLUSION

Plaintiffs' Amended Complaint states claims which are viable. It provides Defendants with notice and the ability to draw the reasonable inference Defendants are liable for the misconduct alleged.

DATED this 17<sup>th</sup> day of August, 2018.

By /s/ Jesse Valdez  
Jesse Valdez, WSBA #35378  
VALDEZ LEHMAN, PLLC.  
Co-Counsel and Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2018, I caused a true and correct copy of the above to be served to the following in the manner indicated below:

Ghazal Sharifi, WSBA #47750  
Jeff Wolf, WSBA #20107  
Attorneys for Defendant  
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Attorney for defendants  
*Via Email and U.S. Mail*

/s/ Jesse Valdez  
Jesse Valdez

Plaintiff's Response to Defendant's Partial Motion to Dismiss Under 12(b)(6)

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